IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR

BENCH, JAIPUR

JUDGMENT

::

S.B. Civil First Appeal No. 30/1989
against the judgment and decree dated 15.03.1989 in Civil Suit No. 27/82 (15/77) partly decreeing the plaintiff's suit for damages for malicious prosecution

Ram Lal *Versus* Mahender Singh
Defendant-Appellant Plaintiff-Respondent

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against the judgment and decree dated 15.03.1989 in Civil Suit No. 27/82 (15/77) partly decreeing the plaintiff's suit for damages for malicious prosecution

Mahender Singh *Versus* Ram Lal
Plaintiff-Appellant Defendant-Respondent

Date of order :: September 5, 2007
REPORTABLE

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Anil Mehta for the plaintiff-appellant
Mr. Parag Rastogi for the defendant-respondent

BY THE COURT:

1. These cross appeals arise out of the impugned judgment and decree dated 15.03.1989 awarding damages to the plaintiff Mahender Singh S/o Girraj Prasad on account of malicious prosecution by the defendant Ram Lal S/o Manna Ram in a criminal case under Section 302 IPC.

2. The claimant Mahender Singh claimed damages to the extent of Rs. 31,000/- in the said civil suit, whereas the learned trial court has granted the decree to the extent of Rs. 11,500/- deciding the issue No. 1, 2, 3 and 6A in favour of the plaintiff.

3. According to the plaintiff Mahender Singh, around 14.01.1973, Pooran Singh son of defendant Ram Lal committed suicide in Nadbai, District Bharatpur and after the postmortem of the dead body recovered from a well in the village, the body was handed over to the defendant Ram Lal, which was cremated on 18.01.1973 and thereafter on 27.01.1973, the defendant Ram Lal filed a FIR falsely implicating the plaintiff Mahender Singh and his father Girraj Prasad, who was a

medical practitioner in the said town and they had to face criminal trial for over three years and had to remain in custody in connection with the same for a period of about three months from 24.05.1973 to 16.06.1975. According to plaintiff, while the father Girraj Prasad was discharged by the competent court on 04.06.1976, the plaintiff was acquitted after trial by the court vide its judgment dated 04.06.1976 Ex.6. Thereafter, the plaintiff filed the present suit on 26.05.1977 for malicious prosecution and claimed damages. The defendant Ram Lal filed written statement on 04.08.1977 and issues were framed on 14.07.1978. The additional issue No. 6A about malicious prosecution was framed on 21.07.1978. The plaintiff examined 11 witnesses and produced 22 documentary evidences Ex.1 to Ex.22, whereas the defendant examined 11 defence witnesses and exhibited 18 documents Ex.A/1 to Ex.A/18. The defendant Ram Lal expired on 10.01.1992 during the pendency of these appeals and his LRs were brought on record.

4. Mr. Parag Rastogi, learned counsel appearing for the defendant-appellant in the first appeal No. 30/1989 and respondent in first appeal No. 91/1989 urged firstly that the appeal of the plaintiff Mahender Singh had abated with the death of the defendant Ram Lal on 10.01.1992. He relied upon Section 306 of the Hindu Succession Act, 1925, which is reproduced hereunder:-

> *"306. Demands and rights of action of or against deceased survive to and against executor or administrator.- All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, 1860 (45 of 1860) or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.*
>
> *Illustrations*
>
> *(i) A collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any*

action. The cause of action does not survive.

(ii) A sues for divorce. A dies. The cause of action does not survive to his representative."

5. He relied upon various judgments in support of his submission of abatement of plaintiff's appeal, namely

(i) G. Jayaprakash Vs. The State of Andhra Pradesh & Ors. reported in AIR 1977 Andhra Pradesh 20.

(ii) M. Veerappa Vs. Evelyn sequeira & Ors. reported in (1988) 1 UJ (SC) 720

It would be appropriate to reproduce relevant extract of para 6 to 9 of the aforesaid Supreme Court decision in M. Veerappa's case :-

6. As against the preponderant view taken by several High Courts, a Full Bench of the Calcutta High Court alone took a contrary view in Krishna Behari Sen vs. Corporation of Calcutta (1) (supra) Maclean, C.J. Speaking for the Bench held that the words, "personal injuries not causing the death of the party" if accorded their natural and ordinary meaning appear to refer to physical injuries to the person which do not cause death. As has been pointed out by Das. J in Punjabsingh vs. Ramautar Singh (11) (Supra), the ratio in

Krishna Behari Sen's (1) case had not been followed subsequently by the Calcutta High Court itself in any other case. The view taken by the Calcutta High Court found solitary acceptance only in a decision of the Rangoon High Court in D.K. Cassim & Sons. vs. Sara Bibi (ILR XIII Rangoon 385). It is therefore clear that the contrary view taken by the Calcutta High Court is against the weight of judicial pronouncements by other High Courts.

7. In a slightly different context the matter came to be considered by this Court in Melepurath Sankunni Ezhuthassan vs. Thekittil Geopalankutty Nair (16) (AIR 1986 SC 411). A plaintiff's suit for damages for defamation was decreed by the Appellate Court but dismissed by the High court in Second Appeal. There was an appeal to this Court by the plaintiff by special leave and during its pendency the plaintiff died. Thus Court declined to allow the legal representatives of the plaintiff to come on record and prosecute the appeal on the ground that by reason of the dismissal of the suit by the High Court, the plaintiff stood relegated to his original position and, therefore, the proceedings abated on his death. The decision pointed out that the position would have been different if the plaintiff had a subsisting decree in his favour because then the cause of action would get merged in the decree and the decree would form part of the estate of the deceased which his legal representatives are entitled to uphold.

*8. The maxim '**actio personalis cum***

moritur persona' has been applied not only to those cases where a plaintiff dies during the pendency of a suit filed by him for damages for personal injuries sustained by him but also to cases where a plaintiff dies during the pendency of an appeal to the Appellate Court, be it the First Appellate Court or the Second Appellate Court against the dismissal of the suit by the Trial Court and/or the First Appellate Court as the case may be. This is on the footing that by reason of the dismissal of the suit by the Trial Court or the First Appellate Court as the case may be, the plaintiff stands relegated to his original position before the Trial court. Vide the decisions in Punjab Singh vs. Ramautar Singh (11) (Supra) Irulappa vs. Madhava (5) (supra) Maniramlala vs. Mt. Chalti Bai & Anr. (8) supra, Baboolal vs. Ram Lal (10) (supra) and Meleporath Sankunni Ezhuthassan vs. Thekittll Geopalankutty Nair (16) (supra). Palaniappa Chettiar vs. Hajah of Ramnad (4) (supra), and Motilal vs. Harnarayan (supra it was held that a suit for na action which has abated cannot be continued thereafter even for the limited purpose of recovering the costs suffered by the injured party. The maxim of actio personalis cum moritur persona has been held inapplicable only in those cases where the injury caused to the deceased person has tangibly affected his estate or has caused an accretion to the estate of the wrong doer vide Rustomji Dorabji vs. W.H. Nurse (2) (supra) & Ratanlal vs. Baboolal (13) (supra) as well as in those cases where a suit for damages for defamation, assault or other personal injureis sustained by the plaintiff had resulted in a decree in favour of the plaintiff because in

such a case the cause of action becomes merged in the decree and the decretal debt forms part of the plaintiff's estate and the appeal from the decree by the defendant become a question of benefit or detriment to the estate of the plaintiff which his legal representatives are entitled to uphold and defend (vide Gopal vs. Ramchandra (7) (supra) and Melepurath Sankunni vs. Thekittil (16) (supra).

9. Though Section 306 speaks only of executors and administrators and Order XXII Rule 3 Civil Procedure Code sets out the rights of legal representatives to continue the proceedings instituted earlier by a deceased plaintiff if the right to sue survives, the courts have taken the view that the legal representatives stand on par with executors and administrators regarding their right to seek implement in order to continue the suit."

6. The Hon'ble Supreme Court in the case of ***Melepurath Sankunni Ezhuthassan Vs. Thekittil Geopalankutty Nair*** reported in **AIR 1986 Supreme Court 411** held as under :-

"Section 306 speaks of an action and not of an appeal. Reading S.306 along with Rr. 1 and 11 of O. XXII of the Code of Civil Procedure, 1908, it is, however, clear that a cause of action for defamation does not survive the death of the appellant.

(Para 6)

> *Where a **suit for defamation** is dismissed and the plaintiff has filed an appeal, what the appellant-plaintiff is seeking to enforce in the appeal is his right to sue for damages for defamation and **as this right does not survive his death**, his legal representative has no right to be brought on the record of the appeal in his place and stead if the appellant dies during the pendency of the appeal. **The position, however, is different where a suit for defamation has resulted in a decree in favour of the plaintiff** because in such a case the cause of action has merged in the decree and the decretal debt forms part of his estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff-respondent which his legal representative is entitled to uphold and defend and is, therefore, entitled to be substituted in place of the deceased respondent-plaintiff."*

7. Thus, as far as the question of abatement is concerned, on the basis of the aforesaid legal position, since the suit was partly decreed by the learned trial court in favour of the plaintiff to the extent of Rs. 11,500/-, the appeal cannot be said to have abated on the death of the defendant Ram Lal on 10.01.1992 because the cause of action stood merged in the

decree and therefore, right to sue for enhancement of the decretal amount in the present appeal against wrong rejection of part of the claim survived with the plaintiff- appellant and the further damages, if any awarded in favour of the plaintiff, could be recovered from the estate of the defendant. Therefore, the preliminary objection of the learned counsel for the defendant that the appeal of plaintiff has abated, deserves to be overruled and the same is accordingly overruled.

8. Now coming to the merits of the case, learned counsel for the plaintiff-appellant Mr. Anil Mehta not only supported the impugned judgment and decree in favour of plaintiff to the extent that the prosecution by defendant Ram Lal of the criminal trial regarding the suicide committed by his son Pooran was malicious inasmuch as he not only directly filed FIR with the Superintendent of Police, Bharatpur after so many days of the death, but he adduced and produced before the court false evidences to see that the accused persons are harassed and face prosecution and conviction. However, he submits that

the plaintiff and his father were let off in the said trial by the competent court and since the prosecution in question was malicious, therefore, the learned trial court ought to have awarded the compensation to full extent of Rs. 31,000/-.

9. On the side opposite, Mr. Parag Rastogi learned counsel appearing for the defendant-respondent submitted that in a suit for malicious prosecution in Torts law, the following ingredients are required to be proved by the plaintiff :-

(i) The plaintiff has to prove that he was prosecuted by the defendant;

(ii) The proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating;

(iii) The prosecution was instituted against him without any reasonable and probable cause; and

(iv) It was due to a malicious intention of the defendant and not with a mere intention of

carrying the law into effect.

According to learned counsel mere assisting the Public Prosecutor appearing on behalf of the State in a criminal trial, as a complainant, the defendant Ram Lal cannot be said to have maliciously prosecuted the plaintiffs. According to him, there were reasons to suspect that the accused persons were involved in the crime of murder of his son Pooran. Merely because the plaintiffs were acquitted or discharged in a criminal trial, it cannot be said that the prosecution was malicious on behalf of the complainant because in such cases the prosecution cannot be said without any reasonable and probable cause. He submitted that the learned trial court while deciding the issue No. 6A relating to malicious prosecution, clearly found that the father of the plaintiff Mahender Singh, namely Girraj Prasad was doing medical practice in Nadbai and he had some shops constructed and one of which was in the tenancy of one Lekhraj, wherein the defendant Ram Lal and one Om Prakash were also working. In execution of a decree of eviction obtained by the said landlord Girraj Prasad, the vacant

possession was handed over to the landlord on 26.12.1972 upon a mutual agreement between the parties and the Nazir's report in this respect Ex.14 clearly shows that there was no occasion after handing over such peaceful possession of the shop in question for the defendant Ram Lal to have threatened the said landlord Girraj Prasad or his son plaintiff Mahender Singh, who was a student of a college at that time and was not present at the time of handing over of such possession of shop, with any dire consequences. Therefore, the said ground taken by the plaintiff in the present suit for alleged malicious prosecution of the plaintiff in that criminal trial does not arise. He submitted that therefore, the learned trial court could not have gone beyond the pleadings of the plaintiff in this regard who had pleaded only this ground to be a ground of malicious prosecution and still hold the prosecution in criminal trial as a malicious prosecution. Relying on various decisions of this court, the learned counsel for the defendant urged that no case of malicious prosecution was made out by the plaintiff and therefore, the suit itself was required to be rejected. He relied

on the following judgments :-

(i) Kedar Nath Vs. Brahmanand reported in (1958) RLW 434

(ii) Nandlal Vs. State of Rajasthan reported in (1970) RLW 201

(iii) Hazur Singh Vs. Jang Singh reported in (1973) RLW 219

(iv) Brijlal & Anr. Vs. Premchand reported in AIR 1974 Rajasthan 124

(v) State of Raj. Vs. Mohan Lal reported in (1992) 1 RLR 625

(vi) Amar Singh Vs. Smt. Bhagwati reported in AIR 2001 Rajasthan 14

(vii) Sugan Kanwar Vs. Rakesh reported in (2007) 1 RLR 431

(viii) Messrs. Trojan & Co. Vs. RM.N.N. Nagappa Chettiar reported in AIR 1953 Sup. Court 235

10. The legal position was summarized by the Division Bench of this court in *Nandlal Vs. State of Rajasthan* (supra) as under:-

> *"In a suit for the recovery of damages for malicious prosecution mere production of the judgment of a criminal court is not sufficient for the plaintiff to discharge the burden of proving malice and want of reasonable and probable cause. Criminal court may either acquit or discharge a person. There may not be sufficient ground for proceeding with a criminal*

case, for the evidence adduced by the prosecution might not have been relied upon for some reason or the other and yet the defendant might have good grounds for launching prosecution against the plaintiff. ***The fact that the prosecution ended in the discharge or acquittal of the accused does not necessarily warrant that the accusation made was baseless to the knowledge of the prosecutor*** *: vide Rishab Kumar Vs. K.C. Sharma (I). In a suit for malicious prosecution it is no part of duty of the civil court to take into consideration all the documents submitted before the criminal court to offer comments on the dictum of the criminal court. Its function is to consider the evidence produced before it and then decide whether or not the plaintiff has succeeded in making out a case against the opposite party."*

11. In *Brijlal & Anr. Vs. Premchand* (supra) this court held as under :-

"In these civil proceedings for the recovery of the damages ***the function of the Court is to see whether the prosecution was lodged without any reasonable and probable cause****. The prosecutor need not be convinced as to the guilt or maintainability of the criminal proceedings before he files the complaint. He may only be satisfied that there is a proper case to approach the Court.*

14. In Badriprasad v. Jagannath, 1971 Rai LW 430, Bhargava, J. observed that the correct rule in such cases is that where

difficult, doubtful and nice questions of law are involved and the person in position of the prosecutor cannot be expected to form correct opinion of them, he cannot be made liable in an action for damages for malicious prosecution simply because his view of law was wrong."

12. From the perusal of pleadings, evidence on record and judgment of the criminal court as well as the impugned judgment, this court is of the opinion that the plaintiff had failed to prove that the defendant Ram Lal had maliciously prosecuted the plaintiff Mahender Singh and his father Girraj Prasad in the criminal trial. Merely because he lodged an FIR with the S.P., Bharatpur after recovery of the dead body of his son Pooran and pursuing the case as a complainant through his advocate before the said court, it cannot be said that the defendant Ram Lal had any malice in this regard. The background of averments as made in the civil suit claiming damages for malicious prosecution that since the defendant alongwith other persons Lekhraj and Om Prakash were got evicted from the shop in question belonging to Girraj Prasad on 26.12.1972 and thereupon the defendant Ram Lal threatened

them with dire consequences, does not cut any ice. The said handing over of possession of shop does not appear to have any relation with the unfortunate death of the son of the defendant Ram Lal on 14.01.1973 even though the said event occurred after about 20 days of the handing over of the possession of the shop. Ex.14, the report of the court Nazir clearly shows that upon a mutual agreement between the parties, the possession of the shop was handed over to the landlord Girraj Prasad and right to file complaint on the death of son Ram Lal in suspicious circumstances and casting doubt on the plaintiff and his father does not mean, in the opinion of this court, that the defendant was prosecuting the plaintiff without any reasonable and probable cause. It is duty of the State and the Public Prosecutor to prosecute the criminal trial and the defendant as a complainant could very well assist the prosecution as complainant through his advocate. Merely because the plaintiffs came to be acquitted or discharged by the criminal court as the prosecution failed to prove the case beyond doubt as is required in criminal law, it does not mean

that such acquittal or discharge could necessarily boomerang upon the defendant as a case for malicious prosecution. The burden of proof squarely lied upon the plaintiffs to prove that the prosecution was malicious, malafide and done with an intention to harass and defame the plaintiffs. No such case is made out in the present case by the plaintiffs much less proved.

13. Accordingly, this court is of the opinion that the suit filed by the plaintiffs deserves to be dismissed. Consequently, the First Appeal No. 30/1989 filed by the defendant Ram Lal is allowed while First Appeal No. 91/1989 filed by the plaintiff Mahender Singh is dismissed. The Civil Suit No. 27/82 (15/77) filed by the plaintiff Mahender Singh stands dismissed. The defendant Ram Lal would be entitled to refund of amount of Rs. 11,500/- said to have already been deposited in pursuance of the impugned decree as a consequence of rejection of the suit. The plaintiff Mahendra Singh would pay back the said amount to the defendant Ram Lal with interest at the rate of 9%

per annum from the date of deposit till date of refund within a period of three months from today. Both the parties are allowed to bear their own costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No.